

RICHARD F. PACROPIS,)
)
Plaintiff,)
)
v.)
)
DAVID DUSEK, JAMES GRAHAM,) C.A. No. N20C-06-277 FWW
DELAWARE PROPANE, LLC,)
JACK LINGO, INC. REALTOR,)
and GARRISON HOMES, LLC.,)
)
Defendants/Third-Party Plaintiffs,)
)
v.)
)
ABC SALES AND SERVICE, INC.,)
CHARLES MESSINA PLUMBING AND)
ELECTRIC CO., and WOLF)
APPLIANCE, INC.,)
)
Third-Party Defendants,)
)
WOLF APPLIANCE, INC.,)
)
Third Party Defendant/)
Fourth Party Plaintiff,)
)
v.)
)
SEAMLESS INSTALLATION)
SERVICES LLC and CHARLES)
MESSINA PLUMBING AND)
ELECTRIC CO.,)
)
Fourth-Party Defendants.)

Submitted: January 27, 2023
Decided: March 23, 2023

Upon Defendant Jack Lingo's Motion for Summary Judgment
DENIED.

ORDER

Timothy A. Dillon, Esquire, McCANN DILLON JAFFE & LAMB, LLC, 300 Delaware Avenue, Suite 805, Wilmington, Delaware 19801, Attorney for Plaintiff Richard F. Pacropis.

Marc Sposato, Esquire, MARKS, O'NEILL, O'BRIEN, DOHERTY & KELLY, P.C., 300 Delaware Avenue, Suite 900, Wilmington, Delaware 19801, Attorney for Defendants David Dusek and James Graham.

William R. Adams, Esquire, DICKIE, McCAMEY & CHILCOTE, 222 Delaware Avenue, Suite 1040, Wilmington, Delaware 19801; James Lynn, Esquire, KIERNAN TREBACH, Ten Penn Center, Suite 770, Philadelphia, Pennsylvania 19103, Attorneys for Defendant Delaware Propane, LLC.

Lisa M. Grubb, Esquire, MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, 1007 North Orange Street, Suite 600, P.O. Box 8888, Wilmington, Delaware 19899, Attorney for Defendant Jack Lingo, Inc. Realtor.

Scott G. Wilcox, Esquire, MOORE & RUTT, P.A., 1007 North Orange Street, Suite 446, Wilmington, Delaware 19801, Attorney for Defendant Garrison Homes, LLC.

Kenneth M. Doss, Esquire, CASARINO CHRISTMAN SHALK RANSOM & DOSS, P.A., 1007 North Orange Street, Suite 1100, P.O. Box 1276, Wilmington, Delaware 19899, Attorney for Third-Party Defendant ABC Sales & Service, Inc.

Susan List Hauske, Esquire, TYBOUT, REDFEARN & PELL, 501 Carr Road, Suite 300, Wilmington, Delaware 19809, Attorney for Third-Party Defendant Charles Messina Plumbing & Electrical Co.

Timothy S. Martin, Esquire, WHITE AND WILLIAMS, LLP, 600 North King Street, Suite 800, Wilmington, Delaware 19801, Attorney for Third-Party Defendant/Fourth-Party Plaintiff Wolf Appliance, Inc.

Cynthia G. Beam, Esquire, REGER RIZZO & DARNALL, LLP, 1521 Concord Pike, Suite 305, Wilmington, Delaware 19803, Attorney for Fourth-Party Defendant Seamless Installation Services.

WHARTON, J.

This 23rd day of March, 2023, upon consideration of Defendant Jack Lingo, Inc. Realtor’s (“Lingo”) Motion for Summary Judgment and all parties’ responses, it appears to the Court that:

1. Plaintiff Richard F. Pacropis (“Pacropis”) rented a beach house in Rehoboth Beach from July 28, 2018 to August 4, 2018).¹ The home was built by Garrison Homes, LLC (“Garrison”),² owned by Defendants David Dusek and James Graham (jointly “Homeowners”),³ and rented through Lingo.⁴

2. The Amended Complaint alleges that on July 29, 2018, while Pacropis was using the onsite barbeque grill installed and maintained by Delaware Propane, LLC (“Delaware Propane”), “a flame explosion suddenly shot out from the lower portions of the grill and flashed into [Pacropis’] body. This flame explosion caused significant bodily injury to [him.]”⁵ On June 26, 2020 Pacropis filed suit claiming that his injuries were caused by the collective negligence of the Homeowners, Delaware Propane, Lingo, and

¹ Amend. Compl. at ¶ 6, D.I. 27. The Amended Complaint was filed to substitute “Garrison Homes, LLC.” for “Garrison Builders, Inc.” See, D.I. 23.

² *Id.* at ¶ 11.

³ *Id.* at ¶ 8.

⁴ *Id.* at ¶ 10.

⁵ *Id.* at ¶ 7.

Garrison.⁶ On May 3, 2021, Pacropis filed his Amended Complaint correcting Garrison's name.⁷

3. Over time, the litigation expanded. Garrison brought a third-party complaint against ABC Sales and Service, Inc. ("ABC") and Charles Messina Plumbing and Electric Co. ("Messina").⁸ Lingo brought a third-party complaint against Wolf Appliance, Inc. ("Wolf").⁹ Wolf, in turn, brought a fourth-party complaint against Seamless Installation Services, LLC ("Seamless") and Messina.¹⁰ Defendants generally have cross-claimed for contribution and indemnification.

4. On December 30, 2022, Lingo filed its Motion for Summary Judgment.¹¹ It argues that the indemnification language of its rental agreement with Pacropis (the "License Agreement"), which it entered into on behalf of the Homeowners, contractually insulates it from the current litigation.¹² Therefore, summary judgment in its favor is appropriate.¹³ In

⁶ Compl., D.I. 1.

⁷ Amend. Compl., D.I. 27.

⁸ Def. Garrison Homes, LLC's Ans. and Third Party Compl., D.I. 29.

⁹ Def. Lingo's Amend. Ans. with Cross-Claims and Third-Party Compl., D.I. 62

¹⁰ Third-Party Def. Wolf's Ans. to Third-Party Pl. Lingo's Third-Party Compl. with Cross-Claims, Affirmative Defenses, and Fourth-Party Compl., D.I. 68.

¹¹ Def. Lingo's Mot. for Summ. J., D.I. 98.

¹² *Id.*

¹³ *Id.*

particular Lingo relies on three provisions of the Licensing Agreement signed by Pacropis. Paragraph 7 provides:

Tenant acknowledges that he/she has personally inspected the property and accepts it in “as is” condition, or, if he/she has not inspected the premises, and/or rented by phone or online, he/she waives the right to withhold rent for any alleged deficiency in the premises or to otherwise claim that the property or [its] location has been misrepresented to him/her either by Landlord or by Agent...Guest agrees the premises are in good, sound and reliable condition and that if he/she is not personally acquainted with the condition of the premises that he/she will make an inspection thereof to determine any weakness that may result in injury to him/her or his/her family or guests, and that he will indemnify [Lingo], Agents of [Lingo] and/or Landlord for any injuries, accidental or otherwise that may be incurred or suffered upon the premises for any cause whatsoever during the term of this contract.¹⁴

Paragraph 12 provides:

It is mutually agreed that [Lingo] is acting as Agent only and has no liability to either party for the performance of any term or covenant of this Agreement and has no liability to the Guest or to anyone else if for some unknown reason it should later determine that the premises do not meet with requirements of government authorities.¹⁵

Lastly, Paragraph 18 provides:

If Landlord is sued by Guest...for personal injury or death, or by loss or damage of personal property sustained during Guest’s lease term on premises, sidewalk, driveway, or upon adjacent property of Landlord for any reason or for

¹⁴ *Id.*, Ex. B, at 2.

¹⁵ *Id.*

whatever the cause (excluding willful conduct on Landlord's part), Guest will indemnify and save harmless from, and concurrently reimburse Landlord for all legal costs, attorney fees and expenses reasonably incurred in the defense of such claim and from any adverse judgment rendered against Landlord in Landlord's individual or corporate names.¹⁶

5. Seamless, ABC, Garrison, and Messina take no position on the motion.¹⁷ Wolf also takes no position on the merits of the motion but points out that granting Lingo's request would have the collateral effect of deeming the third-party complaint Lingo brought against it extinguished, resulting in Wolf being dismissed as a matter of law."¹⁸

6. Delaware Propane opposes the motion as premature.¹⁹ It points to the fact that "all appropriate parties" have only recently been joined, that discovery is not complete, and that if the motion were granted, "between one to four potentially liable entities will be dismissed from the case prior to any depositions being conducted."²⁰

¹⁶ *Id.*

¹⁷ D.I. 101 (Seamless), D.I. 104 (ABC), D.I. 106 (Garrison), and D.I. 107 (Messina).

¹⁸ Wolf's Resp. to Def. Lingo's Mot. for Summ. J., D.I. 113.

¹⁹ Def. Delaware Propane's Resp. to Def. Lingo's Mot. for Summ. J., D.I. 114.

²⁰ *Id.*

7. Pacropis also opposes the motion.²¹ Relying on 6 *Del. C.* §2704(a),²² he claims that the indemnification language “is void as against public policy” and that “it is also unenforceable as it is far from precise and clear, as is required.”²³ He argues that there are several issues of material fact

²¹ Pl.’s Resp. in Opp. To Def. Lingo’s Mot. for Summ. J., D.I. 115.

²² “A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement (including but not limited to a contract or agreement with the State, any county, municipality or political subdivision of the State, or with any agency, commission, department, body or board of any of them, as well as any contract or agreement with a private party or entity) relative to the construction, alteration, repair or maintenance in the State of a road, highway, driveway, street, bridge or entrance or walkway of any type constructed thereon in the State, and building, structure, appurtenance or appliance in the State, including without limiting the generality of the foregoing, the moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee or indemnitee or others, or their agents, servants and employees, for damages arising from liability for bodily injury or death to persons or damage to property caused partially or solely by, or resulting partially or solely from, or arising partially or solely out of the negligence of such promisee or indemnitee or others than the promisor or indemnitor, or its subcontractors, agents, servants or employees, is against public policy and is void and unenforceable, even where such covenant, promise, agreement or understanding is crystal clear and unambiguous in obligating the promisor or indemnitor to indemnify or hold harmless the promisee or indemnitee from liability resulting from such promisee's or indemnitee's own negligence. This section shall apply to all phases of the preconstruction, construction, repairs and maintenance described in this subsection, and nothing in this section shall be construed to limit its application to preconstruction professionals such as designers, planners and architects; provided, however, that this section shall not apply to any obligation owed to the Department of Transportation pursuant to a contract awarded under Title 17 or Chapter 69 of Title 29.” 6 *Del. C.* § 2704(a).

²³ Pl.’s Resp., D.I. 115.

present, that the License Agreement’s formatting is inappropriately inconspicuous, and that the motion is premature for many of the same reasons argued by Wolf.²⁴

8. Superior Court Rule 56(c) provides that summary judgment is appropriate when “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.”²⁵ The movant bears the initial burden of showing that the undisputed facts support its claims or defenses.²⁶ If that burden is met, the burden shifts to the non-movant to show that there are triable issues to be litigated by the parties.²⁷ Summary judgment is inappropriate when material facts are in dispute, “it seems desirable to inquire more thoroughly into [the facts, or] to clarify the application of the law to the circumstances[.]”²⁸ Importantly, “there is no absolute right to summary judgment[;]”²⁹ the Court has the discretion to order the record be further developed before rendering its decision.³⁰

²⁴ *Id.*

²⁵ Super. Ct. Civ R. 56(c).

²⁶ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)(citations omitted).

²⁷ *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979)(citations omitted); *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995)(citations omitted).

²⁸ *Ebersole v. Lowengrub*, 180 A.2d 467, 468–69, (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957)).

²⁹ *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005)(citations omitted).

³⁰ *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005)(“We consider it an exercise of ‘good judicial administration [for

9. The core issue here concerns the applicability of 6 *Del. C.* § 2704(a) - whether Lingo is indemnified or public policy precludes it. To clarify, Delaware has long recognized that indemnity agreements, insulating the indemnitee from their own negligence, may be valid and enforceable.³¹ However, the release must be: 1) clear and unequivocal, 2) not unconscionable, and 3) not against public policy.³²

10. Here, the Court finds it prudent to exercise its discretion and allow the record to be developed further before deciding this matter. For example, more information on the cause of the explosion almost certainly would be helpful in clarifying whether any or all of the defendants (including third and fourth-party defendants) bear responsibility.³³ Further, it might be helpful to further develop the record on whether an inspection of the premises would have put Pacropis on notice of the potential for the grill to explode, and if so, what kind of inspection would reveal that potential. Until the record is

a trial court] to withhold decision ... until [the record] present[s] a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts.”)(quoting *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

³¹ See e.g., *Marshall v. Maryland, D. & V. Ry. Co.*, 112 A. 526, 527 (Del. Super. Ct. 1921).

³² *Ketler v. PFPA, LLC*, 2015 WL 3540187 at *2 (Del. Super. Ct. June 3, 2015), *aff’d*, 132 A.3d 746 at *747 (Del. 2016).

³³ Expert reports (presumably opining on causation) are not due until November 10, 2023 and the Discovery deadline is not until November 30, 2023. Joint Stip. to Amend. the Trial Scheduling Order, D.I. 112.

developed more fully, the Court finds that a determination of the enforceability of the terms of the License Agreement relied upon by Lingo in support of its motion and the applicability of 6 *Del. C.* § 2704(a) to the facts here is premature.

THEREFORE, the Motion for Summary Judgment of Defendant Jack Lingo, Inc. Realtor is **DENIED**.

/s/ Ferris W. Wharton
Ferris W. Wharton, J.